IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 19, 2008

TAMRA MICHELE (TAYLOR) CARLSON v. GLENN RICHARD CARLSON, ET AL.

Appeal from the Circuit Court for Hamilton County
No. 05-D-1254 Jacqueline E. Bolton, Judge

No. E2007-01276-COA-R3-CV - FILED OCTOBER 27, 2008

This is a divorce case. Both parties raise issues. Tamra Michele (Taylor) Carlson ("Mother") contends the trial court erred in failing to find that Father was willfully underemployed. In addition, she seeks an award of fees for her attorney's services on this appeal. Glenn Richard Carlson ("Father') argues that the trial court erred in requiring him to pay the bulk of the private school tuition for his children and in failing to describe with precision his tuition obligation. He also says that the court erred in failing to make a determination as to who should pay any federal income tax due on a distribution to the parties by Father's former businesses. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court, Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, SP.J., joined.

John R. Meldorf, III, Hixon, Tennessee, for the appellant, Glenn Richard Carlson

Sandra J. Bott, Chattanooga, Tennessee, for the appellee, Tamra Michele (Taylor) Carlson

OPINION

I.

This case was filed in July 2005. At trial, the parties focused primarily on two issues: (1) the valuation of Father's interests in a closely held corporation and other related businesses, and (2) the increase in value of those interests during the marriage. Father and his business associates had a written agreement pursuant to which the total amount to be paid to Father for his interests would be $442,672. The payments were to be made over a ten-year period without interest. Based on expert testimony at trial, the court rejected Father's argument that the parties' agreement accurately reflects the value of his interests. Instead, the court fixed that value at $767,500. The court awarded Mother one-half of that total value. In addition, the court directed that Mother's share would be paid over five years with interest at 10% per annum. While the court's decision regarding the valuation and the method of payment are not at issue on this appeal, the tax implications of the court's decree are. Furthermore, neither party challenges the trial court's overall valuation and distribution of the net marital estate. The court's decision to award Mother a divorce and place certain restrictions on Father's time with his children are also not challenged on this appeal.

II.

Mother raises two issues:

> 1. Did the trial court abuse its discretion in failing to make a finding that Father was willfully underemployed?
>
> 2. Should Mother be awarded attorneys' fees incurred in this appeal?

Father presents three issues:

> 1. Did the trial court abuse its discretion in requiring Father to pay the substantial portion of his children's private school tuition as an "extraordinary educational expense" that must be added to the amount of the child support computed under the Child Support Guidelines.
>
> 2. Did the trial court abuse its discretion in describing the private school tuition obligation without stating the actual cost of the tuition.
>
> 3. Did the trial court abuse its discretion in failing to state who has the responsibility for the tax to be paid on assets in the amount of $767,500 to be divided between Mother and Father, which represents the increase in value of Father's business interests from the time of marriage until the time of divorce.

III.

Our review is *de novo* upon the record of the proceedings below. That record comes to us with a presumption that the trial judge's factual findings are correct. Tenn. R. App. P . 13(d). We must honor this presumption unless we find that the evidence preponderates against those findings. ***Id.***; ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984). Our review of the trial court's conclusions on matters of law, however, is *de novo* with no presumption of correctness. ***Taylor v. Fezell***, 158 S.W.3d 352, 357 (Tenn. 2005). We likewise review the trial court's application of law to the facts *de novo*, with no presumption of correctness. ***State v. Thacker***, 164 S.W.3d 208, 248 (Tenn. 2005).

Trial courts, unlike appellate courts, are able to observe witnesses as they testify and to assess their demeanor and other indices of credibility. Thus, trial courts are in a unique position to evaluate witness credibility. *See* ***Bolin v. State***, 405 S.W.2d 768, 771 (Tenn. 1966). Accordingly, appellate courts will not re-evaluate a trial court's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999); ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315, 315-16 (Tenn. 1987). This is certainly generally true in matters involving divorce and child support issues where the standard of review is abuse of discretion. Since 1984, the criteria governing determinations of a parent's child support obligation has been ascertained by application of the Child Support Guidelines[1] promulgated by the Tennessee Department of Human Services. ***Richardson v. Spanos***, 189 S.W.3d 720, 724-25 (Tenn. Ct. App. 2005). Prior to the enactment of Child Support Guidelines, courts had wide discretion in determining the issue of child support. ***Id.*** at 725 (citations omitted). Although adoption of the Guidelines has substantially limited the discretion of trial courts, those courts nonetheless may deviate from the Child Support Guidelines when they make certain findings and follow certain procedures. ***Id.***

In the ***Richardson*** case, this court clearly stated the current standard:

> [A] trial court will be found to have "abused its discretion" when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.

Id. (citing ***Perry v. Perry***, 114 S.W.3d 465, 467 (Tenn. 2003); ***Clinard v. Blackwood***, 46 S.W.3d 177, 182 (Tenn. 2001); ***Overstreet v. Shoney's, Inc.***, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)).

[1]This case was tried in 2007; thus, the Guidelines adopted effective June, 2006, apply.

IV.

A.

Mother argues that the trial court erred in failing to find Father to be willfully underemployed. She relies on the case of ***Willis v. Willis***, 62 S.W.3d 735 (Tenn. Ct. App. 2001). In ***Willis*** this court found that the father's decision to terminate his prior employment was willful and voluntary. The ***Willis*** court observed that whether a party is willfully and voluntarily underemployed is a fact question and that trial courts are accorded considerable discretion in making such decisions. ***Id.*** at 738. The ***Willis*** court also noted that in making such a determination, a trial court should "consider the party's past and present employment and whether the party's choice to accept a lower paying job was reasonable and made in good faith." ***Id.*** (citation omitted). The court summed up the policy basis for these rules, saying as follows:

> Although we realize that a person has a right to pursue happiness and to make reasonable employment choices, an obligor parent will not be allowed to lessen his child support obligation as a result of choosing to work at a lower paying job.

Id. (citation omitted).

In this case, Mother had not worked outside the home since 1999. She became employed during the pendency of the divorce at David Brainerd Christian School, earning $1,118.06 per month. At the time of the marriage and through the time the complaint for divorce was filed, Father was working as a physical therapist in business with his brother Gary and a friend, Andrew Marini. Father had wages and income from his various business interests in 2002 of $159,164; in 2003, his earnings were $236,514; in 2004, he made $175,464; and, in 2005, his earnings were $206,102.[2] In addition, Father received other benefits: health insurance, life insurance, continuing education, an automobile, uniforms, cable television and disability insurance. The businesses owned a beach house in Navarre, Florida, which was available for Father's use.

At the time of trial, however, Father had taken a job that paid $70,000 and had few of the benefits of his previous employment. Father argued at trial, and now before us, that his child support should be based on the $70,000 figure, while Mother contends that it should be based upon earnings of $206,000.

The final judgment incorporated the court's memorandum opinion. In those documents, the court did not make a specific finding that utilized the words "willfully underemployed." However, the trial court did make a finding that "[a]t the time of trial, . . . the husband was in the process of either quitting or being terminated from his employment with various physical therapy businesses."

---

[2] The adjusted gross income in 2002 was $152,792. In 2003 it was $226,187. In 2004 it was $164,747, and in 2005 it was $194.608.

Then the court awarded child support based on Father's income at his new job—$70,000. It thus appears that the court implicitly found that Father was not willfully underemployed.

The issue of Father's motive in selling his business interests during the pendency of the divorce case was hotly contested. The testimony at trial is filled with inconsistencies concerning whether Father voluntarily entered a contract to sell his business interests or resigned under threat of termination.

Mother joined Father's businesses as party defendants in this case.[3] In their answer, the businesses responded that they were "not aware, and do not believe, that [Father] intends to resign from either company." Then, at trial, Andrew Marini testified that the shareholders asked Father to withdraw from the business and that, had he not chosen to withdraw voluntarily, he would have been terminated. Mr. Marini testified that Father's performance had been declining for some time. In addition, he said that a particular incident involving an error on Father's part just before the buyout agreement was reached would have, in any event, resulted in immediate termination.

As Mother correctly points out, Mr. Marini's testimony is self-serving. He clearly wished to make the best deal for the businesses that he could. The record is replete with questions to him concerning the value of the businesses and Father's interests in them to which Mr. Marini failed to respond. The trial court specifically noted Mr. Marini's unresponsiveness, as follows: "The Court finds that the testimony of [Mother's] expert Terri Jeter-McAvoy is more persuasive than the lack of opinion proffered by the [Father] through Andy Marini."

We are mindful of the testimony in this record that would support a finding that Father was willfully underemployed. Father testified that he left the businesses because he was not "happy." Also, following a pre-trial court appearance, he sent his wife an email saying, among other things:

> What you need to get into your head/brain whatever and understand through therapy or seeing it in black and white is this: there is no big lump sum payment coming to you/there is no cash like that anywhere. I can resign from the company for my own reasons and work where I want and you have no control over that. I am not going to be your everlasting money tree; . . . .

In the same email he threatened to take bankruptcy. Father reiterated his view in cross-examination, saying: "I can resign from the company, for my own reasons."

Father also attempted to enter a buyout agreement with his business associates despite being under the court's restraining order not to do so. There were two pre-trial hearings over these attempts. When the time came for serious discussion, Father did not make any effort to independently determine the value of his holdings. Rather, he simply accepted what Andrew Marini

[3]The businesses initially filed a notice of appeal, but later withdrew it. They have not filed a brief in this appeal.

offered – $442,672. Father also agreed with his associates that the amount could be paid over a ten-year period with no interest. Mother's expert, Terri Jeter-McAvoy, testified that the value of Father's interests was $767,500, and the trial court accepted that value as the "more enlightened proof . . . ."

After reviewing the record *de novo,* we find that the trial court did not abuse its discretion. While there is evidence in the record supporting each side's position on the subject of whether Father was "willfully underemployed" – all of which we have reviewed giving due deference to the trial court's role in credibility determinations – we cannot say that the evidence preponderates against the trial court's use of the $70,000 figure or the court's implicit factual finding that Father was not willfully underemployed.

B.

Father and Mother were married in 1997. This was the first marriage for each. The couple had two children—a girl born in 1999, and a boy born in 2001. Mother has a college degree. Father has a clinical doctorate in physical therapy.

The trial court made a factual finding that, at the time of the trial, the two children were attending private school. The court opined as follows:

> The Court awards, based on his present earnings, child support to be based upon $70,000.00. The Defendant will be required to pay tuition costs, if any, at the Brainerd Christian School where the Plaintiff works. If Plaintiff chooses to send the children to another school, she will pay the difference between the cost of tuition as an employee of Brainerd Christian School and the school she chooses for the children to attend. The cost to Defendant is for tuition only at any school.

After considering Father's motion to alter or amend the judgment, the court ordered that the permanent parenting plan be amended as follows:

> Item III(F) is amended by deleting this section in its entirety and substituting and incorporating instead the language relative to private school tuition contained in Pages 2 and 3 of the Court's Memorandum Opinion, which was incorporated by reference into the Final Decree in this cause. Father shall pay his portion of the children's private school tuition, if any, directly to the educational provider . . . .

The children attend St. Peter's Episcopal School. They have never attended Brainerd Christain School. At the time of trial, the tuition for the daughter at St. Peter's was $6,995 per year and the

tuition for the son was $4,658. Mother works at Brainerd Christian School, where tuition costs are less than those at St. Peter's. Mother testified that while Brainerd does not presently have an employee discount for tuition, it may adopt one in the future.

Father's brief states the issue this way: "Whether the honorable trial court erred in awarding private school tuition for his children." This somewhat misstates the question. It is clear from reading the trial court's holding that Father is required to pay the tuition that would be charged by Brainerd Christian School and Mother is obligated to pay the difference between Brainerd's tuition and the higher costs at St. Peter's, where she prefers that the children attend. In addition, Mother is paying for the expenses such as books, uniforms, field trips, food, fees and other related expenses of attending school. The gist of Father's argument is that he cannot afford his court-ordered tuition obligation.

The leading case on the issue of the interplay between general child support and private school tuition is ***Barnett v. Barnett***, 27 S.W.3d 904 (2000). In that case the Supreme Court held that private school tuition is an "extraordinary educational expense" and must be added to the obligor's base child support computed under the Child Support Guidelines. ***Id.*** at 907. In ***Kaplan v. Bugalla***, 188 S.W.3d 632 (Tenn. 2006), the court held that the imposition of the entire amount of the extraordinary educational expense on the non-custodial parent "could" be an unjust or inappropriate application of the guidelines. ***Id.*** at 636 (quoting ***Barnett v. Barnett***, 27 S.W.3d at 908.)

Although trial courts do not have the same amount of discretion they had pre-adoption of the Child Support Guidelines, the courts retain an element of discretion. *See* ***Richardson v. Spanos***, 189 S.W.3d at 725. Thus, review is under "the deferential 'abuse of discretion' standard." ***Id.*** The ***Richardson*** court describes the standard this way: "This standard . . . calls for less intense appellate review and, therefore, less likelihood that the trial court's decision will be reversed. ***Id.*** (citing ***State ex rel. Jones v. Looper***, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); ***White v. Vanderbilt Univ.***, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999)).

The child support guidelines applicable at the time of trial provide:

> Extraordinary educational expenses may be added to the presumptive child support order as a deviation. Extraordinary educational expenses include, but are not limited to, tuition, room, board, lab fees, books, fees, and other reasonable and necessary expenses associated with special needs education or private elementary and/or secondary schooling that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together.

In this case, while married, the parents made a decision to begin their daughter's education at St. Peter's Episcopal School. At trial Father argued that Mother made the decision to which he merely agreed. It does not matter who made the decision, however, if an upward deviation is warranted. ***Umstot v. Umstot***, 968 S.W.2d 819, 824-25 (Tenn. Ct. App. 1997). S*ee also* ***Richardson***

v. Spanos, 189 S.W.3d at 728 (mother raising child by herself makes educational decisions on behalf of child, including choosing between public and private school—Tennessee law encourages, but does not compel consultation between parents).

Father relies on this court's decision in ***Dickson v. Dickson***, No. E2004-01680-COA-R3-CV, 2005 WL 3287443 (Tn. Ct. App. E.S., filed December 5, 2005) for the proposition that the Child Support Guidelines will not be applied if the result is unjust or inequitable. In ***Dickson***, the part of the judgment ordering the father to pay the children's private school tuition was modified by us to allow him to pay only a percentage of the tuition. In this case, the trial court's judgment has already apportioned the cost of the tuition between Mother and Father. Mother pays the difference between the Brainerd and St. Peter's school tuition. Mother also pays all related school expenses.

Father also relies on several additional cases in which an award of private school tuition was in some way modified. The Guidelines, however, specifically provide that extraordinary expenses shall be considered on a case-by-case basis. Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(i). Thus, the outcomes in these cases are of no particular significance because they are all very fact-specific.

Father refers the court to ***Kaplan v. Bugalla***, No. M2006-02413-COA-R3-CV, 2007 WL 4117787 (Tenn. Ct. App. M.S., filed November 16, 2007), which was the appeal of the trial court's decision on remand following the Supreme Court's decision in ***Kaplan v. Bugalla***, 188 S.W.3d 632 (Tenn. 2006). Father argues that "[t]he Middle Section seems to demand specific financial and cost information before a Trial Court can decide the private school question."

To the extent Father is suggesting that the trial court in the instant case did not rely on such information, he is mistaken. A significant number of financial documents were introduced at trial including Father's earnings history since 2002. The court found that Father's income for child support purposes was $70,000 and Mother's monthly income was $1,118.06. Both parties testified to the specific cost of tuition per child at St. Peter's Episcopal School—the school the children were attending at the time of trial.

Father points to the part of the Child Support Guideline providing that "[e]xtraordinary educational expenses include, but are not limited to, tuition, room, board, lab fees, books, fees, and other reasonable and necessary expenses . . . that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together." Father emphasizes the language "that are appropriate to the parents' financial abilities." It is clear the trial court considered Father's arguments that he cannot afford to pay private school expenses.

The court also considered, however, that part of the Guidelines that refers to "the lifestyle of the child if the parents and child were living together." At the time the divorce was filed the Carlson marital residence was a six bedroom, four and a half bath home with a five car garage. The house was on a golf course and had a swimming pool and bath house. There was also a trampoline and playground. The children now live in a rented house less than half the size of the marital

residence. Attending the same school is the part of their lives that approximates the lifestyle they would have if the parents were living together.

Father argues that he could not afford private school for his children even before the divorce and points to the fact that he borrowed money to pay tuition during the pendency of the divorce. Mother testified, however, that Father put one year's total tuition expense on a credit card in order to gain points to be eligible for a cruise.

There is a rebuttable presumption in all child support cases that the amount of support determined is the correct amount. ***Barnett v. Barnett***, 27 S.W.3d at 907-08 (citing Tenn. Comp. R. & Regs. ch 1240-2-4-.01(2)). The burden to overcome the presumption is on the non-custodial parent. ***Id.*** The trial court heard all the evidence and was in a position to judge the credibility of the evidence and witnesses. The evidence does not preponderate against the trial court's factual findings on this issue. We find that the trial court did not abuse its discretion by the manner in which it apportioned the educational expenses of the children.

C.

Father argues that the trial court erred in failing to make a factual determination of the amount of the tuition at Brainerd Christain School. The trial court held:

> The Defendant will be required to pay tuition costs, if any, at the Brainerd Christian School where the Plaintiff works. If Plaintiff chooses to send the children to another school, she will pay the difference between the cost of tuition as an employee of Brainerd Christian School and the school she chooses for the children to attend. The cost to Defendant is for tuition only at any school.

There was testimony as to the cost of the tuition at the school the children were attending at the time of trial. The cost of tuition at Brainerd Christian School is known to the parties or is easily ascertainable. Thus, the trial court did not abuse its discretion in describing Father's private school tuition obligation without stating the actual cost of the tuition.

D.

Father argues that the trial court erred in failing to state who is responsible for the federal income taxes that will be due, if any, on the distribution of the $767,500 to be paid by Father's former business associates to Mother and Father. This court can find no evidence in the record pertaining to the tax implications of the subject distribution. Nor do we find that the attorney for Father asked for a finding concerning the tax liability at trial or in post-trial motions. The issue is not one that we are required to address; and we elect not to address it. Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful

effect of an error.") Even if we were inclined to address this issue, there is no evidence before us upon which we could make a decision. The trial court did not abuse its discretion in failing to make a finding not requested on proof not in the record.

E.

Mother argues that she is due the award of attorney's fees incurred on appeal. *See* Tenn. Code Ann. § 36-5-103(c) (2005); ***Alexander v. Alexander***, 34 S.W.3d 456, 466 (Tenn. Ct. App. 2000). Exercising our discretion, we decline to award fees for professional services rendered on this appeal.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Glenn Richard Carlson. This case is remanded to the trial court for enforcement of the trial court's judgment and for collection of costs awarded below, all pursuant to applicable law.

_____
CHARLES D. SUSANO, JR., JUDGE